

IN THE  
**UNITED STATES**  
**CIRCUIT COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

---

UNITED STATES OF AMERICA,

*Appellant,*

vs.

MERCHANTS TRANSFER & STORAGE Co., a corporation,  
SKINNER & EDDY CORPORATION, a corporation,  
LEWIS L. STEDMAN, Liquidating Trustee of Skinner  
and Eddy Shipbuilding Company, a dissolved cor-  
poration, and KING COUNTY, WASHINGTON, a mu-  
nicipal corporation,  
*Appellees.*

---

and

MERCHANTS TRANSFER & STORAGE COMPANY, a cor-  
poration, SKINNER & EDDY CORPORATION, a corpora-  
tion, and LEWIS L. STEDMAN, Liquidating Trustee  
of Skinner and Eddy Shipbuilding Company, a dis-  
solved corporation,  
*Appellants,*

vs.

UNITED STATES OF AMERICA and KING COUNTY, WASH-  
INGTON, a municipal corporation,  
*Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN DIVISION

---

ANSWER BRIEF OF MERCHANTS TRANSFER &  
STORAGE CO., a corporation, SKINNER & EDDY COR-  
PORATION, a corporation, and LEWIS L. STEDMAN,  
Liquidating Trustee of Skinner and Eddy Shipbuilding  
Company, a dissolved corporation.

RUMMENS & GRIFFIN,

1107 American Building, Seattle, Washington.  
*Attorneys for Merchants Transfer & Storage  
Co., a corporation, Appellee.*

LEWIS L. STEDMAN,

1503 Hoge Building, Seattle, Washington.  
*Attorney for Skinner & Eddy Corporation, a  
corporation, and Lewis L. Stedman, Liqui-  
dating Trustee of Skinner and Eddy Ship-  
building Company, a dissolved corporation,  
Appellees.*

APR - 6 1944



IN THE  
**UNITED STATES**  
**CIRCUIT COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

---

UNITED STATES OF AMERICA,

*Appellant,*

vs.

MERCHANTS TRANSFER & STORAGE CO., a corporation,  
SKINNER & EDDY CORPORATION, a corporation,  
LEWIS L. STEDMAN, Liquidating Trustee of Skinner  
and Eddy Shipbuilding Company, a dissolved cor-  
poration, and KING COUNTY, WASHINGTON, a mu-  
nicipal corporation,

*Appellees.*

and

MERCHANTS TRANSFER & STORAGE COMPANY, a cor-  
poration, SKINNER & EDDY CORPORATION, a corpor-  
ation, and LEWIS L. STEDMAN, Liquidating Trustee  
of Skinner and Eddy Shipbuilding Company, a dis-  
solved corporation,

*Appellants,*

vs.

UNITED STATES OF AMERICA and KING COUNTY, WASH-  
INGTON, a municipal corporation,

*Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN DIVISION

ANSWER BRIEF OF MERCHANTS TRANSFER &  
STORAGE CO., a corporation, SKINNER & EDDY COR-  
PORATION, a corporation, and LEWIS L. STEDMAN,  
Liquidating Trustee of Skinner and Eddy Shipbuilding  
Company, a dissolved corporation.

RUMMENS & GRIFFIN,

1107 American Building, Seattle, Washington.  
*Attorneys for Merchants Transfer & Storage  
Co., a corporation, Appellee.*

LEWIS L. STEDMAN,

1503 Hoge Building, Seattle, Washington.  
*Attorney for Skinner & Eddy Corporation, a  
corporation, and Lewis L. Stedman, Liqui-  
dating Trustee of Skinner and Eddy Ship-  
building Company, a dissolved corporation,  
Appellees.*



## INDEX

	<i>Page</i>
Statement .....	1
Argument .....	5
<b>THE CROSS APPEAL .....</b>	<b>27</b>
Questions Presented.....	27
Specifications of Error .....	27
Argument.....	28

### CITATIONS

18 Am. Jur. 741, Note 2.....	29
<i>Bauman v. Ross</i> , 167 U.S. 548, 42 L. ed. 270.....	12
<i>Bessette v. Conkey</i> , 194 U.S. 324, 48 L. ed. 997.....	23
<i>Campbell v. U. S.</i> , 266 U.S. 368, 69 L. ed. 328.....	11, 13
<i>Carr v. U. S.</i> , 98 U.S. 433, 25 L. ed. 209.....	6
<i>Carmack v. U. S.</i> , 135 F.(2d) 196.....	18, 19
<i>City of Oakland v. U. S.</i> , 124 F.(2d) 959.....	10, 16
<i>Commercial Station P. O. v. U. S.</i> , 48 F.(2d) 183.....	11, 27
<i>Cyclopedia of Federal Procedure</i> , Vol. 4, Sec. 1119, page 259; Vol. 7, Chapter 83, Sec. 3730, page 791 <i>et seq.</i> .....	31
<i>Davis Warehouse Co. v. Bowles</i> , Vol. 88 L. ed. Ad- vance Opinions, No. 7, page 379 .....	2
<i>Davis v. Cleveland, etc.</i> , 217 U.S. 147, 54 L. ed. 708 .....	6
<i>Davis, The</i> , 10 Wall. 15, 19 L. ed. 875.....	6
<i>Debs, In re</i> , 158 U.S. 564, 39 L. ed. 1092.....	23
<i>Hecht Co. v. Bowles</i> , Vol. 88 U.S. Sup. Ct. L. ed. Ad- vance Opinions No. 9, page 465.....	17
<i>Joslin v. Providence</i> , 262 U.S. 668, 67 L. ed. 1167....	12
<i>Luckenbach S. S. Co. v. Norwegian Barque Thekla</i> , 266 U.S. 327, 69 L. ed. 313.....	6, 24
<i>Milligan, Ex parte</i> , 4 Wall. 2, 124, 18 L. ed. 281.....	20
<i>Mitchell v. Harmony</i> , 13 How. 115, 14 L. ed. 75.....	21
<i>Old Dominion Land Co. v. U. S.</i> , 269 U.S. 55, 70 L. ed. 162 .....	15
<i>Pumpelly v. Green Bay, etc. Co.</i> , 13 Wall. 166, 20 L. ed. 557.....	14

	<i>Page</i>
<i>Seaboard Air Line R. Co. v. U. S.</i> , 261 U.S. 296, 67 L. ed. 664 .....	9
<i>Siren, The</i> , 7 Wall. 152, 19 L. ed. 129 .....	6
<i>Sterling v. Constantin</i> , 287 U.S. 378, 77 L. ed. 375 .....	20, 22
<i>Terry, Ex parte</i> , 128 U.S. 289, 32 L. ed. 405 .....	22
<i>U. S. v. Cress</i> , 243 U.S. 316 .....	13
<i>U. S. v. Lynch</i> , 188 U.S. 445, 47 L. ed. 539 .....	13
<i>U. S. v. Miller</i> , 317 U.S. 369, 87 L. ed. 336 .....	12
<i>U. S. v. Montana</i> , 134 F.(2d) 194 .....	16
<i>U. S. v. North American Co.</i> , 253 U.S. 330, 64 L. ed. 935 .....	10
<i>U. S. v. 243.22 acres of land</i> , 129 F.(2d) 678 .....	16
<i>Williams v. Parker</i> , 188 U.S. 491, 47 L. ed. 559 .....	12
2 Words and Phrases, 1277 .....	6

### STATUTES

Act of March 5, 1890, C. 26 Statute 17 (5 U.S.C.A. 182) .....	28
Act of June 3, 1916, C. 134, Sec. 5 a., 44 Stat. 784 (5 U.S.C.A. Appendix 182 A) .....	29
Act of December 16, 1940, C. 931, Sec. 1, 54 Stat. 1224 (5 U.S.C.A. Appendix 181 A) .....	28
Declaration of Taking Act of February 26, 1931 .....	6, 12, 30
General Condemnation Act of August 1, 1888 .....	9
R. S. Sec. 725, 1 Stat. 83 .....	23
R. S. 214 (5 U.S.C.A. 181) (Act of Aug. 7, 1789) ....	28
Second War Powers Act of March 27, 1942....5, 7, 8, 30	
28 U.S.C.A. 385. Notes 21, 22 and 23 .....	31

IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

*Appellant,*

vs.

MERCHANTS TRANSFER & STORAGE CO., a corporation,  
SKINNER & EDDY CORPORATION, a corporation,  
LEWIS L. STEDMAN, Liquidating Trustee of Skinner  
and Eddy Shipbuilding Company, a dissolved cor-  
poration, and KING COUNTY, WASHINGTON, a mu-  
nicipal corporation,  
*Appellees.*

---

and

---

MERCHANTS TRANSFER & STORAGE COMPANY, a cor-  
poration, SKINNER & EDDY CORPORATION, a corpor-  
ation, and LEWIS L. STEDMAN, Liquidating Trustee  
of Skinner and Eddy Shipbuilding Company, a dis-  
solved corporation,  
*Appellants,*

vs.

UNITED STATES OF AMERICA and KING COUNTY, WASH-  
INGTON, a municipal corporation,  
*Appellees.*

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN DIVISION

---

ANSWER BRIEF OF MERCHANTS TRANSFER &  
STORAGE CO., a corporation, SKINNER & EDDY COR-  
PORATION, a corporation, and LEWIS L. STEDMAN,  
Liquidating Trustee of Skinner and Eddy Shipbuilding  
Company, a dissolved corporation.

---

STATEMENT

The Government appeals from an order requiring  
the United States forthwith to return to the con-  
demnee possession of property wrongfully taken and

if not forthwith restored to Appellee, contempt damages will be later assessed, claiming:

- (a) That the court had no power to enter such order; and
- (b) That the original order denying "immediate" possession after hearing in condemnation proceedings, was invalid.

Appellee, Skinner and Eddy Corporation, is the owner of the fee and Appellee, Merchants Transfer & Storage Co., is the lessee.

Generally, hereafter, where we refer to Appellee, unless otherwise stated, is meant the Lessee (Italics ours).

Lessee is a public warehouse, licensed under the laws of the State of Washington—Uniform Warehouse Receipts Act. Ten per cent of its warehouse space was held for use by the Government and it was classed by the Government as an essential war industry (R. 95).

Appellee is, then, a public utility.

*Davis Warehouse Co. v. Bowles*, Vol. 88, L. ed. Advance Opinions No. 7, page 379.

The above case, decided January 31, 1944, holds that such a warehouse is a public utility, within the meaning of the Price Control Act and that such warehouse is not subject to Federal control.

In 1941 the Government, in proper proceedings, condemned the warehouse property then occupied by Appellee. No other warehouse space was available but Appellee obtained a five year lease (Exhibit A-1) upon the building now in question at a rental of \$850.00 per month and spent \$12,500.00 in structural

improvements so that it could carry the necessary loads (R. 96).

On July 29, 1943 the *Acting Secretary of War*, Robert P. Patterson, directed the Attorney General:

“\* \* \* It is requested that you cause the necessary proceedings to be instituted for the *condemnation* of a term of years ending June 30, 1944, extendable for yearly periods thereafter during the existing national emergency \* \* \*

“It is requested that pursuant to the provisions of the Act of Congress approved March 27, 1942 (Public Law 507-77 Congress) *supra*, you procure from the court an order granting to the United States immediate possession of the aforesaid lands.” (R. 167, Ex. 3)

On June 30, 1943, the Attorney General directed his Special Assistant in Seattle:

“\* \* \* Will you please prepare and file a petition in condemnation and secure the entry of an order confirming possession pursuant to the Act of Congress of March 27, 1942. \* \* \* Please advise the Department by wire the day and hour the petition is filed and the day fixed in the order of the court for the surrender of the property \* \* \*. (R. 171, Ex. 4)

On August 2, 1943, the Government filed its “Petition in Condemnation,” pleading that:

“The *Acting Secretary of War* has requested the Attorney General to secure an order of the court directing the surrender of the possession of said property described above forthwith and granting to the United States the immediate right to occupy, use and improve said premises.”

The prayer conforms with the petition (R. 3-7).

After a full and complete hearing, the District Court, pursuant complete Findings of Fact and Conclusions of Law (R. 12) on August 13, 1943, entered the order denying the necessity of and the right to immediate possession (R. 21).

Notwithstanding the action pending and the solemn judgment of the court after hearing had, the Government, on the 8th day of September, 1943, acting through Sherman B. Green, "Chief Seattle Sub-Office" of the War Department, Office of Division Engineer, and accompanied by the armed forces of the United States under command of Major S. N. Tideman, Jr., seized the physical possession of said property and ousted the owners from possession thereof (R. 25).

Petition for Rule and Attachment in re: Contempt was duly filed in the cause and Order to Show Cause why they should not be punished for contempt for not abiding the order of the court theretofore entered was issued, directed to the Hon. Henry L. Stimson, Secretary of War, the Hon. Robert P. Patterson, *Under Secretary of War*, Herman B. Green and Major S. N. Tideman, Jr. (R. 23-39).

Upon the hearing in response to said citation, the District Court entered the order from which the appeal is prosecuted:

"This court finding that the plaintiff, United States of America, has taken possession of the property in issue unlawfully and without right and contrary to this court's order of August 13, 1943, denying it immediate possession,

"IT IS ORDERED, ADJUDGED and DECREED that the United States of America forthwith return said

property \* \* \* to the possession of (Appellees) \* \* \*; and

"The United States of America, through its attorneys of record, having stated in open court that possession will not surrendered and the mandate of this court obeyed,

"IT IS ORDERED that if upon the entry of this order possession is not forthwith restored to said parties named then the United States of America will be later assessed as for contempt damages, the amount thereof to be ascertained by further hearings herein \* \* \*." (R. 49)

The individuals cited were adjudged not in contempt (R. 49-52).

### ARGUMENT

Appellant asserts that under the Second War Powers Act (These Acts see Appendix, Appellant's brief 38-41) it could take immediate possession without any order of court.

That general proposition is not before this court upon the Government's appeal.

The Government did not, in the first instance, rely upon that asserted power which would raise a grave constitutional question but, proceeding as specifically directed by the *Acting Secretary of War*, invoked the jurisdiction of the District Court not only in filing its Petition in Condemnation but in seeking an order of the court for immediate possession.

Having admittedly invoked the jurisdiction of the District Court, it then became bound by the order and judgment of that court.

“Jurisdiction” is the power to hear and determine.

*Davis v. Cleveland, etc.*, 217 U.S. 147, 54 L. ed. 708;

2 Words and Phrases, 1277.

“When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter.”

*Luckenbach S. S. Co. v. Norwegian Barque “Thekla,”* 266 U.S. 327, 69 L. ed. 313.

The Government argues (Brief 17) that the Government can be used only so far as Congress has consented. With that we do not disagree except as stated in the *Luckenbach* case, *supra*, when the Government invokes the jurisdiction of the court it is then bound by the result.

*The Siren*, 7 Wall. 152, 19 L. ed. 129;

*The Davis*, 10 Wall. 15, 19 L. ed. 875;

*Carr v. U. S.*, 98 U.S. 433, 25 L. ed. 209.

In the *Carr* case, *supra*, we find:

“The cases like that of *The Siren* and *The Davis* \* \* \* in which the proceeds of government property, incidentally brought into the admiralty, have been subjected to the liens of claimants against the same, stand upon the principle that when the Government itself seeks its right at the hands of the court, equity requires that the rights of other parties interested in the subject matter should be protected \* \* \*.”

Again, referring to *The Siren*, Mr. Justice Bradley, in the *Carr* case, states:

"It was held that, inasmuch as the United States *had resorted to the aid of the court to procure the condemnation* of The Siren, and had thus placed her *proceeds in the course of judicial administration*, any proper claim against the vessel itself, prior to that of the Government, might well be satisfied out of such proceeds. At the same time it was conceded that neither the Government nor its property can be subjected to direct legal proceedings without its consent, \* \* \*."

Whether the Government might have proceeded under the Second War Powers Act without seeking an order for immediate possession is beside the point. The Government invoked the jurisdiction of the court, specifically sought an order for immediate possession, and same, after full hearing, was denied. Having invoked that jurisdiction and the jurisdiction in the cause continuing, the Government was bound by the order entered.

The Second War Powers Act provides that the Secretary of War

- (a) "May acquire, by purchase, donation or other means of transfer," or
- (b) "*May cause proceedings to be instituted in any court having jurisdiction of such proceedings* to acquire by condemnation \* \* \*"
- (c) "Such proceedings to be in accordance with the Act of August 1, 1888 \* \* \* or any other applicable Federal statute \* \* \*."
- (d) "Upon or after the filing of the condemnation petition immediate possession may be taken and the property may be occupied, used and improved for the purposes of this act \* \* \* notwithstanding any other law."

The Government argues that the latter clause should be taken out of its context and read alone. It further argues that the Government always has the right to take the immediate possession of any property, irrespective of statute or of the Fifth Amendment.

We submit that the Government confuses "power" of the Sovereign with "right" of the Sovereign.

Unquestionably, the Government has power, and it exercised that power against the citizen in this instance, using the armed forces of the United States.

A careful reading of the cases will not disclose the right but only the power; but for the Fifth Amendment, the Sovereign would have both power and right. Because of the Fifth Amendment, when it has exercised the power without the right the cases give a right of action to the citizen.

The Second War Powers Act did not extend the rule. Under that Act the condemnation proceedings must be instituted in a court having jurisdiction and under the applicable statutes. One of the applicable statutes is the Declaration of Taking Act of February 26, 1931, which provides that:

"Said declaration of taking shall contain or have annexed thereto \* \* \* (5) a statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken."

"Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto of the amount of the estimated compensation stated in said declaration" title to said lands shall pass.

"Upon the filing of a declaration of taking, the court shall have power to fix the time within

*which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner."*

The original General Condemnation Act of August 1, 1888, specifically provides that the condemnation proceedings shall be "under judicial process."

In the instant case no estimate of just compensation was filed and no money was paid into the registry of the court in this proceeding and, notwithstanding the physical possession by the Government, the tenant is still paying \$850.00 a month under its lease and must continue so to pay for the full five year period.

The Government did not pretend to proceed under any right of immediate taking but sought an order from the court in that particular. Upon the hearing the immediate right was denied.

This case in no wise involves either the power or the right of the Government to condemn this property (upon the Government's appeal). It does involve the claimed right of immediate possession where that right was denied by the District Court having jurisdiction and which jurisdiction was invoked by the Government.

The purpose of the Acts may have some bearing as to both the power and right of the Government upon the one hand and the right of the citizen upon the other.

We will refer particularly to cases relied upon by the Government in its brief.

(a) *Seaboard Air Line R. Co. v. U. S.*, 261 U.S. 296, 67 L. ed. 664.

There, the Government exercised the *power*,—not

the right,—to seize. It did not invoke the jurisdiction of the court. The land owner was compelled to sue.

Said the court:

“Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute. Its ascertainment is a judicial function.”

The distinction, where the Government invokes the jurisdiction of the court in a condemnation proceeding and its liability and the right of the land owner, as distinguished from the power of taking without the right is forcibly stated in

(b) *U. S. v. North American Co.*, 253 U.S. 330, 64 L. ed. 935.

Says Mr. Justice Brandeis, with reference to a condemnation proceeding:

“Such a proceeding is not a suit by the land owner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant; and which the Government institutes in order to secure title to land \* \* \*. On the other hand this suit, brought in the court of claims, is a very different proceeding.”

In the one suit where the Government, using its power, seizes the land owner is relegated to an indispudant action in the Federal courts. In the other, where it proceeds under the orderly processes of the court, it has invoked the jurisdiction of the court and the rights of the land owner are determined in that proceeding. Such is the case at bar.

The Government places great reliance upon

(c) *City of Oakland v. U. S.*, 124 F.(2d) 959.

It is to be noted that in the *Oakland* case the money

was deposited in the registry of the court pursuant to the statute *and the court fixed the time for taking.*

The Circuit Court approved the ruling of the District Court, saying that if, on future hearings, "it is ultimately determined that the declaration of taking is effected with fraud or bad faith, it would follow that the declaration of taking will be a nullity."

The opinion points out that under the statute it was the duty of the court, and the court was required to fix the time and terms upon which defendant should surrender possession.

In the case at bar the Government invoked the jurisdiction of the court to the end that the court should fix the time and terms upon which Appellee should surrender possession. True, it sought immediate possession but it did invoke the jurisdiction, and a careful reading of the *Oakland* case discloses that the court accepted jurisdiction and did fix the time and terms for surrendering possession.

(d) *Campbell v. U. S.*, 266 U.S. 368, 69 L. ed. 328,

is again a case where the Government exercised its power as distinguished from the right and the land owner was relegated to an independent suit.

(e) *Commercial Station P. O. v. U. S.*, 48 F. (2d) 183:

That case is pertinent here, for, says the opinion:

"As to the necessity of the order, the court was not ruled by the necessity but by the advisability of the order. Such determination is within the discretion of the trial court and should not be overruled, unless clearly exercised improperly."

- (f) *Bauman v. Ross*, 167 U.S. 548, 42 L. ed. 270.

That condemnation was under a special act of Congress but the duty of protecting the land owner is well stated in the opinion:

"Under the Constitution, and by the express provision of Section 18 of this Act, the United States are not entitled to possession of the land until the damages have been assessed and actually paid. The payment of the damages to the owner of the land and the vesting of the title in the United States are to be contemporaneous."

To the same effect is

- (g) *Williams v. Parker*, 188 U.S. 491, 47 L. ed. 559.

Says Mr. Justice Brewer:

"There can be no doubt that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to amount which must be paid and before any final determination thereof."

- (h) *Joslin v. Providence*, 262 U.S. 668, 67 L. ed. 1167.

Says the opinion:

"It has long been settled that the taking of property for public use by a state or one of its municipalities need not be accompanied or preceeded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge."

The purpose of the Declaration of Taking Act is stated in *U. S. v. Miller*, 317 U.S. 369, 87 L. ed. 336.

The Government refers to a portion of a paragraph (Brief 25). We complete the paragraph:

"The purpose of the statute is two-fold. First, to give the Government immediate possession of the property and to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment in the eminent domain proceeding. Secondly, to give the former owner, if his title is clear, immediate cash compensation to the extent of the Government's estimate of the value of the property."

The Government relies on *U. S. v. Lynah*, 188 U. S. 445, 47 L. ed. 539; *U. S. v. Cress*, 243 U.S. 316; *Campbell v. U. S.*, 266 U.S. 368.

The *Cress* case simply follows the *Lynah* case and the issue was not raised in the *Campbell* case, the only question being the amount.

We, therefore, go back to the *Lynah* case. Says the opinion:

"All private property is held subject to the necessities of Government. The right of eminent domain underlies all such rights of property. The Government may take personal or real property whenever its necessities, or the exigencies of the occasion, demand. So, the contention that the Government had a paramount right to appropriate the property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this government right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation. \* \* \*.

"The action which was taken, resulting in the overflow and injury to those plaintiffs, is not to be regarded as the personal act of the officers,

but as the act of government. That which the officers did is admitted by the answer to have been done by authority of the Government, and although there may have been no specific act of Congress directing the appropriation of this property of the plaintiffs, yet if that which the officers of the government did, acting under its direction, resulted in an appropriation, it is to be treated as the act of government. \* \* \*”

Mr. Justice Brewer then quotes in part from *Pumpelly v. Green Bay, etc. Co.*, 13 Wall. 166, 20 L. ed. 557:

“It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to *rights of the individual as against the government*, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of property to the uses of the public, it can \* \* \* subject it to total destruction without making any compensation, \* \* \*. Such a construction would pervert the constitutional provision \* \* \*.”

Mr. Justice Brewer proceeds:

“But if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation.”

The above cases indicate the right of the Government

to condemn and take possession under judicial process and the power of the sovereign to take without judicial process. In the latter instance the land owner is relegated to a suit for damages.

In the former instance, having invoked the jurisdiction of the court, the matter of possession and amount is determined in the adversary proceeding of the Government against the land owner.

The jurisdiction of the court having been invoked, that court will determine when possession shall be delivered.

In any and every case where the Government condemns, provision must be made to compensate the land owner. The very purpose of the Declaration and Taking Act was to protect the Government against interest and to give the land owner "immediate cash."

The Government argues that the taking was not arbitrary or capricious (Brief 27).

Bear in mind we are not concerned, on the Government's appeal, with the right to take and condemn this property. We are only concerned with the claim for immediate possession.

Under the Declaration of Taking Act it was the duty of the court to determine when possession should be delivered.

We are not concerned with the "necessity" of the condemnation but only with the claim for immediate possession. On this point, the Government relies on:

- (a) *Old Dominion Land Co. v. U. S.*, 269 U.S. 55, 70 L. ed. 162.

The contention in that case was that the taking was

not for a public use and, therefore, the court had no jurisdiction. That case in no wise involved the immediate right of possession but only the fundamental right to take, which Appellees do not question.

(b) *City of Oakland v. U. S.*, 14 F.(2d) 959.

As we heretofore pointed out, the money was deposited in the registry of the court and the court fixed the time of taking.

(c) *U. S. v. 243.22 acres of land*, 129 F.(2d) 678.

The court there entered an order for immediate possession. Jurisdiction was invoked and the court exercised its discretion.

(d) *U. S. v. Montana*, 134 F.(2d) 194.

Again, the question was not immediate possession. The condemnation was based on an adequate promise for payment.

The Government's position in this court is as summarized by the District Judge:

"\* \* \* The Government's position in effect is that, as to administrative acts of Government War Department officials under the Second War Power Act, there is no judicial review except a review which must result in judicial approval, never disapproval, of administrative action. That I believe is not the law. If it were, a citizen would have no relief in any case against arbitrary or oppressive action of administrative officials." (R. 196)

That same position has been taken by the Government in practically every court in the land under the

terms and provisions of the Emergency Price Control Act.

The latter act provides that:

"Whenever, in the judgment of the administrator, \* \* \* any person has violated Section 4 of the Act \* \* \* he may make application to the appropriate court for an order enjoining such act or practices \* \* \*. A permanent or temporary injunction, restraining order or other order *shall be granted without bond.*"

On February 28, 1944, the Supreme Court of the United States decided *Hecht Co. v. Bowles*, Vol. 88, U.S. Sup. Ct. L. ed. Advance Opinions No. 9, page 465.

Says Mr. Justice Douglas:

"The question in this case is whether the administrator, having established that a defendant has engaged in acts or practices violative of Section 4 of the Act, is entitled *as of right to an injunction*, restraining the defendant from engaging in such acts or practice *or whether the court has some discretion to grant or withhold such relief.*"

It is determined by unanimous court (on this point) that the administrator is not so entitled as a matter of right but that the court, jurisdiction having been invoked, has discretion.

Says the writer:

"We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' *Meredith v. Winter*

*Haven*, 320 U.S. 228, 235, ante, 1, 4, 64 S. Ct. 7. \* \* \*. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument of nice adjustment and reconciliation *between the public interest and private needs* as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied. \* \* \* Hence we resolve the ambiguities of Section 205 (a) in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings under this emergency legislation *in accordance with* their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect.

\* \* \*

“\* \* \* The administrator does not carry the sole burden of the war against inflation. The courts also have been entrusted with a share of that responsibility.”

Neither does the *Acting Secretary of War* carry the sole burden of the war. The Federal Courts have a share of that responsibility.

The argument of the Government upon this point loses sight of the fundamental proposition that the courts are still a coordinate branch of the Government.

In *Carmack v. U. S.*, 135 F.(2d) 196, the court had for consideration a condemnation proceeding by the United States in the taking of property already devoted to a public use.

The District Court refused to consider whether “the

Government had acted arbitrarily in the selection of the property sought to be condemned."

Says the opinion, in reversing:

"This issue we think should have been determined by the court. The record shows without dispute that the property has been devoted to public use \* \* \*. This public use may not, as a matter of law, exempt the property from condemnation for another which may be exercised consistently with the present public use or which is of superior rank in respect to public necessity \* \* \*. Public necessity is a relative term. There is no question of the power of the Government to take this property, but there is a question as to whether by a general act it has determined to exercise that power so far as this property, which is already devoted to a public use, is concerned.

\* \* \*

"While the Government as a sovereignty has inherent power to take private property essential to the public welfare, it exercises that power ordinarily pursuant to specific legislation. The right to determine what is a public use and when there is a public necessity for taking specific property is, in the first instance, a legislative rather than a judicial question, but whether, *in carrying out the purpose of Congress, the officer has acted capriciously or arbitrarily is a judicial question.* \* \* \* That necessity was determined by the acting administrator of Federal works agency, and whether in determining the issue he acted arbitrarily or capriciously should be decided by the trial court."

The *Carmack* case, *supra*, goes further than did the District Court in the instant case. The District Court

denied the Government only the right of immediate possession but not the right to condemn. It found that the Government was, in the circumstances, under the evidence, acting arbitrarily and capriciously.

It follows that the administrative agency of the Government having invoked the judicial processes of the Government and the District Court having jurisdiction to hear and determine, the Government is bound by that determination and the original order denying immediate possession was and is valid.

## II.

In the utmost contempt of that order the administrative officers rendered it a nullity insofar as the rights of Appellee are concerning by then seizing possession, using the armed forces of the United States so to do.

In open court counsel for the administrative officers stated that the mandate of the court would not be obeyed (R. 52).

There is involved in this matter of contempt not the issuance of an "injunction," as argued by Appellant, but there is involved only the inherent power of the court to punish for contempt. In the present instance the power was not only inherent in the court but sustained by the governing statute.

However, the claim that an injunction will not issue against the Sovereign was before the court in *Sterling v. Constantin*, 287 U.S. 378, 77 L. ed. 375.

In that case the State was the sovereign and the governor of Texas declared martial law. The power and

authority of the state and the governor are analogous to the power of the United States and an administrative officer thereof.

After reviewing the broadness and necessity of the power of the governor to declare martial law, the opinion states:

“It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. *What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.*”

Mr. Justice Hughes then quotes with approval from *Mitchell v. Harmony*, 13 How. 115, 14 L. ed. 75:

“‘Every case must depend on its own circumstances. It is the emergency that gives the right and the emergency must be shown to exist before the taking can be justified.’”

The opinion proceeds:

“The assertion that such action can be taken as conclusive proof of its own necessity and must be accepted as in itself due process of law has no support in the decisions of this court.

“Appellants’ contentions find their appropriate answer in what was said by this court in *Ex parte Milligan*, 4 Wall. 2, 124, 18 L. ed. 281, 296, a statement as applicable to the military authority of the state in the case of insurrection as to the military authority of the nation in time of war.”

In the *Milligan* case, 4 Wall. 2, 124, 18 L. ed. 281, it will be recollected that martial law could not be established at the whim of an officer or with the approval of the Commander in Chief.

The language of *Ex parte Milligan* is as important today as in the day that the writer penned the document.

The *Sterling* case concludes that:

"The matter is one of judicial cognizance."

The contemptuous violation under the circumstances of this case of a solemn order of the court continued to be a matter of judicial cognizance and of which the court took notice.

The procedure in the contempt proceedings followed the decisions of the Supreme Court of the United States.

*Ex parte Terry*, 128 U.S. 289, 32 L. ed. 405.

Says Mr. Justice Harlan:

"Nor can there be any dispute as to the power of a Circuit Court of the United States to punish contempt of its authority. In *United States v. Hudson*, 11 U.S. 7, Cranch, 34 (3:259), it was held that the court of the United States, from the very nature of their institution, possess the power to fine for contempt, imprison for contumacy, enforce the observance of order, et. In *Anderson v. Dunn*, 19 U.S. 6 Wheat. 204, 227 (5:242, 247) it was held that 'Courts of justice are universally acknowledged to have been vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates.' So, in *Ex parte Robinson*, 86 U.S. 19 Wall. 505, 510 (22:205, 207) : 'The

power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of judgments, orders and writs of the court, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject they became possessed of this power'."

After reviewing other earlier decisions, the court points out that insofar as the Circuit Court is concerned (of course the District Court as well) the power is also granted by statute (R.S. Sec. 725; 1 Stat. 83).

In *Bessette v. Conkey*, 194 U.S. 324, 48 L. ed. 997, it is stated:

"\* \* \* If a party is ordered by the court to abstain from some action which is injurious to the adverse party, and he disobeys that order, he may also be guilty of contempt \* \* \*.

"\* \* \* A significant and generally determinative feature is that the act is by one party to a suit in disobedience of a special order made in behalf of the other. Yet some times the disobedience may be of such a character and in such a manner as to indicate a contempt of the court rather than a disregard of the rights of the adverse party."

See *In re Debs*, 158 U.S. 564, 39 L. ed. 1092.

In the case at bar counsel for the administrative officers stated in open court that the mandate of the court, to-wit: refusal of immediate possession, would not be obeyed. With the armed forces of the United

States and in absence of martial law, the mandate was not obeyed.

Appellant was a "party" to the very action pending.

The District Court had power to hear and punish not only under the governing statute but under its inherent power.

It is true that that order denying immediate possession did not specifically direct the appellant to do or not to do anything. The order denied immediate possession upon the application made.

Manifestly, the effect of the order was to say to Appellant: "You do not now obtain possession and you shall not interfere with the possession of the land owner." That is the order which the individual officers of the Government, cited to show cause why they should not be punished for contempt, deliberately disobeyed.

That appellants were not acting upon their own initiative is manifest because both in the District Court and in this court the Government has adopted their acts and now endeavors to sustain them in their unlawful posession.

We refer again to *Luckenbach Steamship Co. v. Norwegian Barque Thekla*, 266 U.S. 327, 69 L.ed. 313,

The Government there contended:

"that there is no statute by which the Government accepted this liability."

Said the court:

"It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act."

In the instant case the Government has gone farther and accepted and attempts to sustain the wrongful act of the executive in violation of the court order in a cause then pending and in which the Government was the original moving party.

It follows that Appellant having invoked the jurisdiction of the District Court, as it had a right to do, and by orderly procedure having sought an order for immediate possession, and the court having jurisdiction, and having heard and determined that matter, its order denying immediate possession was valid.

It follows that the action then taken by Appellant in violation of that order and seizing the property necessarily invoked the inherent power of the court to determine the matter of contempt.

In the original condemnation proceedings the Government proceeded to invoke jurisdiction under both its power and its right; having gone into court, it remained in court, and it could not lawfully disregard a lawful order of the court.

The District Court determined that the individuals should not be punished for contempt but that the Government, being the actual party and having adopted the acts of its agents, should be required to pay compensation by way of contempt damages to the land owner for the period of time in which it wrongfully withheld the property in violation of its lawful order.

The Appellant suggests that actually it did not violate the order in taking immediate possession but waited a few days.

The original order was in full force and effect and

the action pending. Appellant was still before the court.

By disregarding and disobeying the valid court order, the Government did a wrong to Appellees. This is a court of equity. Every wrong has a remedy. What is the remedy here?

The United States cannot be brought physically into a court. It can respond in a way to compensate those it has wronged. That is to assess damages as for contempt and award those damages to the injured parties. That is what the District Court did.

### III.

The record amply sustains the Findings of Fact (R. 12) of the District Court.

It is conceded that no other warehouse property was available for the use of Appellee and the Government theretofore condemned and had taken warehouse after warehouse property and renovated the buildings and was then renovating warehouse buildings into office space.

It is suggested that the District Court erred in denying the Government's motion for leave to reopen the case.

The District Court, in passing upon that motion, stated:

"I get the impression from the evidence in this case that the Government has been rather strong on acquiring property and using it for office use \* \* \*. I believe, gentlemen, that that is the evidence that is the most weighty of all in this case in influencing the court's decision as announced.

"So, in view of the statements that have been made by counsel seeking the opportunity of introducing further evidence as well as all counsel opposed to that \* \* \* the request is denied." (R. 192)

The evidence offered was only cumulative and therefore there was no reason why the court should have accepted it.

Such determination was within the wise discretion of the Trial Court and should not be overruled unless clearly exercised improperly.

*Commercial Station P. O. v. U. S.*, 48 F.(2d) 183.

## THE CROSS APPEAL

---

### QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction over the subject matter.
2. Whether the District Court erred in dismissing contempt proceedings against the individual persons.

### SPECIFICATIONS OF ERROR

The District Court erred:

#### I.

In denying the motion of Appellees to dismiss, pursuant Rule 12-B, because:

(a) The court did not have jurisdiction over the subject matter for the reason that the action was instituted pursuant to a request only of the *Acting Secretary of War*;

(b) Because the statement of the estate or interest in said lands which it is sought to take is not sufficiently described and set out.

## II.

In dismissing the contempt proceedings against the individuals cited.

### **ARGUMENT**

The request to condemn and to obtain an order of immediate possession came from only the "*Acting Secretary of War*." There is no such officer as the "*Acting*" Secretary of War.

There is a Secretary of War, of which the courts will take judicial notice.

R. S. 214 (5 U.S.C.A. 181) (Act of August 7, 1789) establishes an executive department "to be known as the Department of War, and a Secretary of War who shall be the head thereof."

By the Act of March 5, 1890, C. 26 Statute 17 (5 U.S.C.A. 182) there was established the office of "Assistant Secretary of War."

By the Act of December 16, 1940, C. 931, Sec. 1, 54 Stat. 1224 (5 U.S.C.A. Appendix 181 A) there was established the office of "Under Secretary of War."

"The Under Secretary of War shall perform such duties as may be prescribed by the Secretary of War or required by law and shall be next in succession to the Secretary of War during his absence or disability or in the event of a temporary vacancy in that office."

By the Act of June 3, 1916, C. 134, Sec. 5 a. 44 Stat. 784 (5 U.S.C.A. Appendix 182 A) there was established an "Additional Assistant Secretary of War."

Congress, through the years, as necessity required, has provided for an Assistant Secretary of War, an Under Secretary of War, and an Additional Assistant Secretary of War.

The Under Secretary of War is next in line.

Congress has never designated an "*Acting*" Secretary of War .

The request, then, to the Attorney General from an "*Acting*" Secretary of War was not a request from a properly designated official of the War Department; was a nullity; and Cross-Appellees' Motion to Dismiss should have been granted.

## II.

The Petition in Condemnation sought to condemn "a term of years ending June 30, 1944"—that is a period less than one year.

Whatever rights are sought to be appropriated must be taken absolutely and unconditionally. 18 Am. Jur. 741. Note 2.

Here, the attempt to take part of the lease manifestly destroyed the lease in its entirety. The face of the Petition in Condemnation did not, then, sufficiently describe the property to be taken. It did not contain "a statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken" and did not pay into the registry of the court any money at all.

The Petition did not conform to the Declaration of Taking Act of February 26, 1931, and that portion of the Declaration of Taking Act was in no wise modified by the Second War Powers Act of March 27, 1942.

The Motion to Dismiss should have been granted.

### III.

The individuals cited for contempt, being members of the War Department, were acting as agents of the War Department. They were the executive officials who deliberately violated the order of the court. Through their counsel they stated in open court that they would violate that order and they did violate it. They used the armed forces of the United States, subject to their control, in defiance of the Federal courts.

Those officers, so acting, were the Honorable Henry L. Stimson, Secretary of War; the Honorable Robert P. Patterson, Under Secretary of War; Sherman B. Green, Chief Seattle Sub-Office for the Division of Engineers, and Major S. N. Tideman, Jr., the officer in charge of the armed personnel that physically seized possession.

The War Department, in the District Court, asserts that these officers had power to act and did act. The Government has adopted and endeavors to sanctify their action and each, individually, personally and deliberately, violated the order of the court.

Under the cases cited in support of punishment for contempt, *supra*, each was and is guilty of contempt.

See also:

Cyclopedia of Federal Procedure, Sec. 1119,  
Vol. 4, page 259; Vol. 7, Chapter 83, Sec.  
3730, page 791 *et seq.*;  
28 U.S.C.A. 385. Notes 21, 22 and 23.

The District Court should have found the individuals guilty of contempt. They knew of the order which, by denying possession, in effect directed the officers of the Government not to take possession. These officers did take possession, thereby wilfully violating the order of the court.

The court had the inherent right to enforce its orders and thus could and should have adjudged these cited officers in contempt.

These officers, except in taking the power into their own hands irrespective of their having theretofore invoked the jurisdiction of the court, were actually proceeding under the authority only of the *Acting Secretary of War* pursuant the order of July 29, 1943.

No claim is made that the Secretary of War or any proper officer of the War Department thereafter issued a new order or directive.

The only claimed directive was that of Sherman B. Green "dated ....." (R. 30). Even this directive refers to and is based upon the original condemnation proceedings of "Second day of August, 1943," in which the Government invoked the jurisdiction of the court.

While the Secretary of War has the power to determine such property as may be necessary to be condemned and taken, certainly there is required an official act upon his part or through his deputies in that particular. In the instant case we have only the or-

iginal directive through which jurisdiction was not only invoked but in which it was specifically directed that jurisdiction should be invoked.

The acts of these officers subsequent thereto, in defiance of the court order, might well constitute a trespass upon their part were it not for the fact that the Government has accepted and is endeavoring to validate their personal action and acts.

If, for some reason, an Appellate Court should hold that the Government, as such, was not in contempt and subject to contempt damages, in that these individuals acted on their own initiative and not "as the Government" but as individual trespassers, it becomes quite important, then, to hold them individually in contempt, and for that reason this Cross-Appeal is made necessary; otherwise, the land owner and lessee would be without remedy.

It is also important to the court, in the attack that was deliberately made upon its dignity and in violation of its legal orders, that the administrative officers render respect and obedience to that court and not disregard and disobey.

We respectfully submit that upon the Government's appeal the carefully considered and able opinion of the courageous Trial Judge should be affirmed. His careful analysis and weighing of the facts does not warrant reversal and his sound conclusions as to the law are amply supported in the governing decisions and the statutes. If affirmed, little attention need be paid to the Cross-Appeal, except as the contempt of

the individuals affects the dignity of the court, but if error is found, then the land owner and tenant should prevail upon their Cross-Appeal.

Respectfully submitted,

RUMMENS & GRIFFIN,

*Attorneys for Merchants Transfer & Storage  
Co., a corporation, Appellee.*

LEWIS L. STEDMAN,

*Attorney for Skinner & Eddy Corporation, a  
corporation, and Lewis L. Stedman, Liqui-  
dating Trustee of Skinner and Eddy Ship-  
building Company, a dissolved corporation,  
Appellees.*

